

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GREGORY ROGGEMAN,

Defendant.

No. CR00-3046

**MEMORANDUM OPINION AND
ORDER REGARDING
MAGISTRATE’S REPORT AND
RECOMMENDATION CONCERNING
DEFENDANT’S MOTION TO
SUPPRESS**

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I. INTRODUCTION AND BACKGROUND

On October 26, 2000, a two-count indictment was returned against defendant Gregory Roggeman, charging him with possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841 (a)(1) and 841(b)(1)(C), and possession of a firearm by an unlawful user of controlled substances and being a felon in possession of a firearm, in violation of 21 U.S.C. §§ 922(g)(1) and 922(g)(3).

On January 8, 2001, defendant Roggeman filed a motion to suppress (#17). In his motion, defendant Roggeman seeks to suppress evidence seized from his person, his vehicle and his residence. Defendant Roggeman asserts, *inter alia*, that after the pickup truck he was driving was stopped for an equipment violation, an Iowa State Patrol Trooper unlawfully conducted a pat-down search of his person. Defendant Roggeman further contends that because the pat-down of his person was illegal, all evidence subsequently found in his pick-up truck and home must be suppressed as fruit of the poisonous tree. Defendant Roggeman's motion to suppress was referred to United States Magistrate Judge Paul A. Zoss, pursuant to 28 U.S.C. § 636(b), for the purpose of holding an evidentiary hearing and preparing a Report and Recommendation on the motion. On January 19, 2001, an evidentiary hearing was held regarding defendant Roggeman's motion to suppress. On January 30, 2001, Judge Zoss filed a Report and Recommendation in which he recommends that defendant Roggeman's motion to suppress be granted. The government filed objections to Judge Zoss's Report and Recommendation on February 13, 2001. The government has filed both several factual objections to Judge Zoss's Report and Recommendation, as well as a number of objections to the legal conclusions reached by Judge Zoss in his Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Roggeman's motion to suppress.

II. LEGAL ANALYSIS

A. Standard Of Review

Pursuant to statute, this court's standard of review for a magistrate judge's report and recommendation is as follows:

A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). Similarly, Federal Rule of Civil Procedure 72(b) provides for review of a magistrate judge's report and recommendation on dispositive motions and prisoner petitions, where objections are made, as follows:

The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

FED. R. CIV. P. 72(b).

As noted above, the government has filed objections to Judge Zoss's Report and Recommendation. The court, therefore, undertakes the necessary review of Judge Zoss's recommended disposition of defendant Roggeman's motion.

B. Objections To Findings Of Fact

The court will address each of the government's factual objections *seriatim*.

1. The Government's First Factual Objection

First, the government objects to the lack of a factual finding that defendant Roggeman was acting nervous at the time of the traffic stop. Although the government

asserts that this point of Iowa State Patrol Trooper Ryan Moore's testimony was "uncontroverted," the court notes that defendant Roggeman testified at the evidentiary hearing that he did not act nervous when he was stopped. Tr. at p. 45. The court's own audio and visual review of the videotape of the traffic stop supports defendant Roggeman's testimony. He does not sound nervous when responding to Trooper Moore's questions. Although Roggeman later became agitated when Trooper Moore patted him down, he was not acting nervous when he got out of the cab of his pick-up truck. Therefore, this factual objection is denied.

2. The Government's Second Factual Objection

The government next objects to the lack of a factual finding that Trooper Moore was alone while conducting the traffic stop of defendant Roggeman. Trooper Moore was alone when he stopped defendant Roggeman's pick-up truck for a loud muffler violation. Therefore, this objection is sustained.

3. The Government's Third Factual Objection

The government also objects to the finding in the report and recommendation that when Trooper Moore asked defendant Roggeman if he had any weapons, he did so in a "routine manner." The government contends that this characterization implies that Trooper Moore did not have a realistic concern that defendant Roggeman had a weapon. The court does not conclude that the fact that Trooper Moore asked defendant Roggeman about his possession of weapons in a "routine manner" implies that Trooper Moore did not have a realistic concern that defendant Roggeman had a weapon. Indeed, it implies nothing whatsoever, but merely characterizes the manner in which Trooper Moore made his inquiry. Therefore, this objection is also denied.

4. The Government's Fourth Factual Objection

The government next objects to Judge Zoss's finding regarding the sequence of events surrounding Trooper Moore's pat down of defendant Roggeman. The government asserts

that Trooper Moore saw the bulge before he asked defendant Roggeman if he had any weapons, then asked him about weapons and then patted down defendant Roggeman's pocket. The court's review of the videotape leads it to conclude that Trooper Moore began asking defendant Roggeman if he had any weapons before he could have seen the bulge in defendant Roggeman's right pants pocket. Trooper Moore begins to inquire about weapons before defendant Roggeman has completely exited the cab of his pick-up truck.

Thus, the court concludes that Trooper Moore did not see the bulge before he asked defendant Roggeman if he had any weapons but, rather, asked him about weapons, then saw the bulge in his pocket, and then patted him down. Therefore, this objection is denied.

5. *The Government's Fifth Factual Objection*

The government next objects to Judge Zoss's characterization that Trooper Moore's testimony, about his suspicions over whether defendant Roggeman might be armed, was "inconsistent." The court notes that during his direct testimony, Trooper Moore testified that the reason he patted down defendant Roggeman was "[b]ecause I was concerned about the bulge that was protruding from his pocket." Tr. at p. 14. Then, on cross-examination, Trooper Moore testified as follows:

- Q. And tell us, if you would, what reason there was that you believed this object you have now described was a weapon in that right front pocket.
- A. I didn't know what the object was. I wanted to know because it was dark and it is hard to visually observe what things are in the dark.
- Q. Okay. So is it--Would your testimony be--Would I be correct if I said your testimony was you had no reason to believe it was a weapon, but you were curious as to what it was? Would that be fair?
- A. Yes, sir.

Tr. at p. 23. On redirect questioning, Trooper Moore provided the following testimony:

Q. Did you have any concern about whether he had a weapon in his right pocket?

A. Yes, I did.

Q. And what was that based on?

A. Based on the bulge and the size of the bulge in his pocket.

Tr. at pp. 30-31. Subsequently, the following colloquy occurred between Trooper Moore and Judge Zoss:

Q. Now, when you saw that bulge in the pocket, what went through your mind?

A. It could be a possible weapon. I was definitely concerned about what it was.

Q. What kind of weapon?

Q. Be it a gun, a small caliber handgun in the pocket.

Tr. at p. 36. Later, during re-cross examination, the following exchange occurred:

Q. Trooper Moore, you said he got out of the car and he had a bulge in his pocket and you described it. What made you think it was a weapon?

A. Just I guess it was concealed in his pocket. I was curious as to what it was.

Q. I understand you were curious. But it just as well could have been a billfold? Yes?

A. It wasn't the shape of a billfold.

Q. Well, could have been a hockey puck?

A. Yes, sir.

Q. Could have been a cigarette lighter?

A. Yes, sir.

Q. And so my question is: He gets out of the car, you see this bulge. Again, I'll ask you, give me one reason that you thought this was a weapon. Just one.

A. Based on my training, the way it looked in his pocket, it possibly could have been a weapon.

Q. Okay. How did it look like a weapon when you saw a bulge in his pocket? How did it look like a weapon?

A. Just the shape of the object, it made me curious as to what it was.

Q. Okay. So it didn't look like a weapon, the shape of it made you curious?

A. Yes, sir.

Q. And so you have no reason to conclude that it is a weapon other than he has got an object in his pocket, am I right?

A. That's correct. Yes.

Tr. at pp. 39-40.

The court concludes that Trooper Moore's testimony regarding his suspicions over whether defendant Roggeman might be armed was equivocal. Therefore, this objection is denied.

6. The Government's Sixth Factual Objection

The government next objects to Judge Zoss's finding that Trooper Moore began

asking defendant Roggeman if he had any weapons before he saw the bulge in defendant Roggeman's right pants pocket. As was noted above, the court's review of the videotape leads it to conclude that Trooper Moore began asking defendant Roggeman if he had any weapons before he could have seen the bulge in defendant Roggeman's right pants pocket. Trooper Moore begins to inquire about weapons before defendant Roggeman has completely exited his vehicle. Therefore, this objection is also denied.

7. *The Government's Seventh Factual Objection*

The government further objects to Judge Zoss's allegedly drawing a "negative factual conclusion" from the fact that Trooper Moore misstated the law to defendant Roggeman concerning Trooper Moore's right to pat down Roggeman. In his report and recommendation, Judge Zoss does not explicitly rely on Trooper Moore's falsehood to defendant Roggeman in reaching his legal conclusions or making his factual findings. Therefore, the court finds no basis to conclude that Judge Zoss made any "negative factual conclusion" from the fact that Trooper Moore misstated the law to defendant Roggeman during the traffic stop. Therefore, this objection is also denied.

8. *The Government's Eighth Factual Objection*

The government further objects to Judge Zoss's allegedly drawing a "negative inference" from Trooper Moore's failure to pat down the rest of defendant Roggeman until after he had issued citations to Roggeman. Judge Zoss noted Trooper Moore's failure to pat down the rest of defendant Roggeman until after he had issued citations in his discussion over whether Trooper Moore had a concern for his safety. The court concludes that the fact that Trooper Moore only patted down the one pocket before issuing citations is a legitimate fact to consider in analyzing whether Trooper Moore was concerned for his safety. Therefore, this objection is denied.

C. Objections Regarding Conclusions Of Law

The government objects to Judge Zoss's conclusion that Trooper Moore violated defendant Roggeman's Fourth Amendment rights when he conducted the pat-down of Roggeman. The government asserts that Trooper Moore had a reasonable, articulable, basis to suspect that defendant Roggeman might have had a weapon and therefore was entitled to pat-down Roggeman for weapons. The government further contends that Judge Zoss employed a subjective test in determining whether the pat-down was justified.¹

Judge Zoss concluded in his report and recommendation that Trooper Moore lacked reasonable suspicion to frisk defendant Roggeman for weapons. In *Warren v. City of Lincoln, Neb.*, 864 F.2d 1436 (8th Cir.) (en banc), *cert. denied*, 490 U.S. 1091 (1989), the Eighth Circuit Court of Appeals noted that the Supreme Court has identified three categories of police-citizen encounters, each justifying a different level of detention:

The first category consists of consensual communications between officers and citizens, involving no coercion or restraint of liberty. Such encounters do not constitute seizures and thus are beyond the scope of the fourth amendment. *See Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1323, 75 L. Ed. 2d 229 (1983). The second category is the so-called *Terry* stop, *see Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1879-80, 20 L. Ed. 2d 889 (1968); *Florida v. Royer*, 460 U.S. at 498-99, 103 S. Ct. at 1324-25, pursuant to which an officer having a reasonable suspicion that a person has committed or is about to commit a crime may temporarily seize the person for limited investigative purposes. Finally, there are full-scale arrests, which must be supported by probable cause. [*United States*] v. *Poitier*, 818 F.2d 679, 682 [(8th Cir.1987), *cert. denied*, 484 U.S. 1006, 108 S. Ct. 700, 98 L. Ed. 2d 651 (1988).]

Id. at 1438-39.

¹While Judge Zoss noted Trooper Moore's lack of subjective suspicion, the court concludes that Judge Zoss applied an objective test in determining that Trooper Moore lacked reasonable suspicion to conduct a pat-down search of defendant Roggeman. Therefore, this objection is denied.

Here, the second category of police-citizen encounters is at issue. The standards used to consider whether reasonable suspicion exists are well defined, although sometimes problematic to apply:

The standard of articulable justification required by the fourth amendment for an investigative, *Terry*-type seizure is whether the police officers were aware of "particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant[ed] suspicion that a crime [was] being committed." *United States v. Martin*, 706 F.2d 263, 265 (8th Cir. 1983); see also *Terry*, 392 U.S. at 20-21, 88 S. Ct. at 1879-80. In assessing whether the requisite degree of suspicion exists, we must determine whether the facts collectively establish reasonable suspicion, not whether each particular fact establishes reasonable suspicion. "[T]he totality of the circumstances--the whole picture--must be taken into account." *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981). We may consider any added meaning certain conduct might suggest to experienced officers trained in the arts of observation and crime detection and acquainted with operating modes of criminals. See *United States v. Wallraff*, 705 F.2d 980, 988 (8th Cir. 1983). It is not necessary that the behavior on which reasonable suspicion is grounded be susceptible only to an interpretation of guilt, *id*; however, the officers must be acting on facts directly relating to the suspect or the suspect's conduct and not just on a "hunch" or on circumstances which "describe a very broad category of predominantly innocent travelers." *Reid v. Georgia*, 448 U.S. [438] at 440- 41, 100 S. Ct. [2752] at 2754 [65 L. Ed. 2d 890 (1980)]; *United States v. Sokolow*, 831 F.2d 1413 (9th Cir. 1987), [rev'd on other grounds, 490 U.S. 1, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)].

United States v. Campbell, 843 F.2d 1089, 1093 (8th Cir. 1988); see *United States v. Gray*, 213 F.3d 998, 1000 (8th Cir. 2000) ("When determining whether a police officer had reasonable suspicion of criminal activity, we must view the totality of the circumstances 'as understood by those versed in the field of law enforcement.'" (quoting *United States v.*

Cortez, 449 U.S. 411, 418 (1981)); *United States v. Beck*, 140 F.3d 1129, 1136 (8th Cir. 1998) (holding that "[t]he standard of articulable justification required by the fourth amendment for an investigative, *Terry*-type seizure is whether the police officers were aware of 'particularized, objective facts which, taken together with rational inferences from those facts, reasonably warrant[ed] suspicion that a crime [was] being committed.'" (quoting *United States v. Martin*, 706 F.2d 263, 265 (8th Cir. 1983)); *United States v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) (holding that "[f]or a *Terry* stop to be considered valid from its inception, 'the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" (quoting *Terry*, 392 U.S. at 21, 88 S. Ct. at 1880).

More specifically, with respect to searches for weapons, the Eighth Circuit Court of Appeals has instructed that:

A police officer may search an individual's outer clothing to discover weapons when the officer reasonably believes that the individual may be armed and dangerous. *Terry*, 392 U.S. at 27, 30, 88 S. Ct. at 1883, 1884; *Sibron [v. New York]*, 392 U.S. [40,] *1323 63-64, 88 S. Ct. [1889] at 1903 [20 L. Ed. 2d 917] [(1968)]. In determining whether the officer acted reasonably in such circumstances, we give due weight "to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience."

United States v. Ward, 23 F.3d 1303, 1306 (8th Cir. 1994) (quoting *Terry*, 392 U.S. at 27).

Applying these principles to evaluate the circumstances known to Trooper Moore at the time he patted-down defendant Roggeman, the court finds that, while a close question, the facts known to Trooper Moore were insufficient to have aroused a reasonable, articulable suspicion on his part that defendant Roggeman might be armed and therefore pose a serious safety risk to Trooper Moore. Although a law enforcement officer's observation of a bulge in an individual's article of clothing that could be made by a weapon

reasonably warrants a belief that the suspect is potentially dangerous, even if the suspect was stopped only for a minor violation, see *Pennsylvania v. Mimms*, 434 U.S. 106, 112 (1977) (per curiam) ("The bulge in the jacket permitted the officer to conclude that [the suspect] was armed and thus posed a serious and present danger to the safety of the officer."), here, Trooper Moore did not consider the bulge in defendant Roggeman's pants pocket to have been possibly made by a weapon at the time he patted-down defendant Roggeman. Rather, the court finds that Trooper Moore was merely curious as to what was causing the bulge. This conclusion is exemplified by Trooper Moore's testimony at the evidentiary hearing:

Q. And tell us, if you would, what reason there was that you believed this object you have now described was a weapon in that right front pocket.

A. I didn't know what the object was. I wanted to know because it was dark and it is hard to visually observe what things are in the dark.

Q. Okay. So is it--Would your testimony be--Would I be correct if I said your testimony was you had no reason to believe it was a weapon, but you were curious as to what it was? Would that be fair?

A. Yes, sir.

Tr. at p. 23. Although the government attempted to rehabilitate Trooper Moore on re-direct, Trooper Moore again conceded on re-cross that he was merely curious about what was causing the bulge in defendant Roggeman's pants pocket:

Q. Trooper Moore, you said he got out of the car and he had a bulge in his pocket and you described it. What made you think it was a weapon?

A. Just I guess it was concealed in his pocket. I was curious as to what it was.

Q. I understand you were curious. But it just as well could have been a billfold? Yes?

A. It wasn't the shape of a billfold.

Q. Well, could have been a hockey puck?

A. Yes, sir.

Q. Could have been a cigarette lighter?

A. Yes, sir.

Q. And so my question is: He gets out of the car, you see this bulge. Again, I'll ask you, give me one reason that you thought this was a weapon. Just one.

A. Based on my training, the way it looked in his pocket, it possibly could have been a weapon.

Q. Okay. How did it look like a weapon when you saw a bulge in his pocket? How did it look like a weapon?

A. Just the shape of the object, it made me curious as to what it was.

Q. Okay. So it didn't look like a weapon, the shape of it made you curious?

A. Yes, sir.

Q. And so you have no reason to conclude that it is a weapon other than he has got an object in his pocket, am I right?

A. That's correct. Yes.

Tr. at pp. 39-40. Based on this testimony, the court concludes that Trooper Moore was acting on nothing but a "hunch" or subjective belief unsupported by objective facts. *United*

States v. Green, 52 F.3d 194, 198 (8th Cir. 1995); *United States v. Bloomfield*, 40 F.3d 910, 919 & n.10 (8th Cir.), *cert. denied*, 514 U.S. 1113 (1995); *United States v. Campbell*, 843 F.2d 1089, 1093 (8th Cir. 1988).

The government asserts that circumstances other than the observed bulge in defendant Roggeman's pants pocket give rise to reasonable, articulable suspicion. These additional circumstances include the time and location of the pat-down search, Trooper Moore conducting the stop by himself, and the nervousness of defendant Roggeman. *See United States v. Douglas*, 964 F.2d 738, 741 (8th Cir. 1992) (in holding that police officer's pat-down search of defendant after investigatory stop was justified the court found officer was warranted in belief that his safety was in danger in light of the fact that it was late at night, he was alone with defendant in dimly lit parking lot, and defendant was wearing long coat which could have concealed a weapon); *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989) ("The hour was late, the street was dark, the officer was alone, and the suspected crime was a burglary, a felony that often involves the use of weapons.") (quoting *United States v. Moore*, 817 F.2d 1105, 1108 (4th Cir. 1987)); *United States v. Tharpe*, 536 F.2d 1098, 1100 (5th Cir. 1976) (in holding that police officer was justified in conducting pat-down search the court considered fact that officer was alone in a poorly lit area facing three men who had evidently been drinking). Taking the last of these circumstances first, the court concluded above that defendant Roggeman was not acting in a nervous manner when speaking with Trooper Moore. Thus, this circumstance is inapplicable here. Although it was shortly after midnight when Trooper Moore stopped defendant Roggeman's vehicle, the court notes that the stop occurred in a well traveled residential neighborhood in Mason City, Iowa. During the stop other vehicles passed by on the street and denizens of the neighborhood were nearby observing the stop. Thus, the time and location of the stop was insufficient to create reasonable suspicion. Finally, the fact that Trooper Moore was conducting the stop by himself is insufficient to support a frisk for weapons. Trooper Moore

was confronted by only one individual, defendant Roggeman, who had been cooperative during the stop. Moreover, the stop was for a non-criminal offense, a motor vehicle equipment violation, and the individual was only blocks from his house, a fact that Trooper Moore would know as a resident of Mason City. Therefore, the court concludes that these other circumstances fail to give rise to a reasonable, articulable suspicion which would warrant a pat-down search of defendant Roggeman. The government's objections to Judge Zoss's legal conclusions are denied.

III. CONCLUSION

The court initially concludes that upon a *de novo* review of the record that Trooper Moore did not have a reasonable, articulable, suspicion that defendant Roggeman was armed or dangerous. Thus, the court concludes that Trooper Moore was not permitted under the Fourth Amendment to conduct a pat-down of defendant Roggeman. The court, therefore, overrules the government's objections as to Judge Zoss's legal conclusions and accepts that portion of Judge Zoss's Report and Recommendation. Defendant Roggeman's motion to suppress is **granted** and all evidence seized from his person, his vehicle and his residence is hereby suppressed.

IT IS SO ORDERED.

DATED this 28th day of February, 2001.

MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA